

PEGGY A. LAUTENSCHLAGER  
ATTORNEY GENERAL

Daniel P. Bach  
Deputy Attorney General

17 W. Main Street  
P.O. Box 7857  
Madison, WI 53707-7857  
www.doj.state.wi.us

JoAnne F. Kloppenburg  
Assistant Attorney General  
kloppenburgjf@doj.state.wi.us  
608/266-9227  
FAX 608/266-2250

May 17, 2005

Richard E. Wedepohl  
Chief of Dam, Safety, Floodplain and Shoreland Section  
Department of Natural Resources  
101 South Webster Street, WT/2  
Madison, Wisconsin

Re: *Hillis v. Village of Fox Point Board of Appeals*

Dear Mr. Wedepohl:

You have asked that this office review a recent court of appeals decision and interpret it in the context of the shoreland zoning cases that we are litigating upon referral from the Department of Natural Resources. The decision was issued on March 15, 2005, in *Hillis v. Village of Fox Point Board of Appeals*. We conclude that while the *Hillis* decision may be correctly decided for municipal zoning under the applicable ordinance provision and statute, the decision does not apply generally to county shoreland zoning, and specifically to county shoreland zoning provisions that impose 50% limitations on the expansion of structures in the shoreland setback.

The question in *Hillis* was whether the village's 50% restriction on expansion of nonconforming buildings applied to limit the expansion of a house that extended over the bluff line. The 50% restriction appeared in a 1958 ordinance provision, and the prohibition against structures over the bluff appeared in a 1989 ordinance provision. The house for which an expansion was sought extended over the bluff since it was built in 1927. *Hillis*, ¶¶9-13. The court of appeals determined that: 1) the village ordinance must be interpreted consistent with the statute providing how municipalities may deal with nonconforming uses, because the village never passed a charter ordinance rejecting that statute's provisions; 2) the house had been properly used as a residence since it was built in 1927 and no nonconformity as to its use existed before or after 1958; 3) the house did not become a nonconforming use under the 1989 provision relating to the location of buildings; and 4) the village ordinance imposes a 50% limitation only on structures that are used in a manner that does not conform to the uses permitted by the ordinance. *Hillis*, ¶¶7-8, 11-14. The court concluded that the house was not subject to the 50% restriction because the house's use was and had always been in full conformity with applicable zoning provisions. *Hillis*, ¶14.

While the *Hillis* opinion provides some guidance for municipalities with ordinances imposing 50% limitations on nonconforming structures, the *Hillis* opinion provides no such guidance for counties. Specifically, the *Hillis* opinion is not authority for the proposition that a county cannot adopt a 50 % or other limitation on the expansion of nonconforming structures, including structures in the shoreland setback area.

Neither the holding nor the analysis in *Hillis* applies to shoreland zoning, for a number of reasons.

First, the *Hillis* case concerns municipal zoning authority under the home rule provisions, and that authority and those provisions do not apply to county zoning.

Second, county shoreland zoning authority arises from Wis. Stat. § 59.692, which provides a generally unlimited authority to impose restrictions, including a 50% rule, on nonconforming structures in shoreland zoning.

Third, as noted in the December 8, 1997, Attorney General's opinion OAG 2-97, counties are not required by statute to impose a 50% rule on nonconforming structures, but case law indicates that they must under the common law have some limitation on continuance and expansion of nonconforming structures, without any distinction as to whether the nonconforming status arises from use or area ordinance provisions. So, counties have an obligation to restrict nonconforming structures and are free to apply a 50% rule to nonconforming structures that violate area limitations, including setbacks.

Fourth, the *Hillis* case concerns the statute providing for 50% restrictions by municipalities, Wis. Stat. § 62.23(7)(h), and that statute differs from the statute providing for 50% restrictions by counties, Wis. Stat. § 59.69(10). Wisconsin Stat. § 59.69(10), plainly read, states that counties may impose a 50% rule against nonconforming structures that are used for an illegal trade or new industry. This specific authority does not affect a county's general authority to impose a 50% restriction or other limitation on nonconforming structures that violate other ordinance provisions under Wis. Stat. § 59.692.

Fifth, the *Hillis* case concerns a bluff limitation, not a setback, as explicitly stated by the court in ¶3.

Finally, the court in *Hillis* does not rely on any case law relevant to shoreland zoning. The court in *Hillis* relies on only one case to support its interpretation of the village ordinance: *Cohen v. Dane County Bd. of Adjustment*, 74 Wis. 2d 87, 90-91, 246 N.W.2d 112 (1976). In *Cohen*, the court was called upon to apply the ordinance's prohibition of a truck terminal in an agricultural district, and to determine whether the term "truck terminal" embraced the property owners' storage of a truck and 4 trailers on their property when the truck and trailers were not being used for the property owners' wholesale grocery and produce business. 74 Wis. 2d at 90-91. In that context, the court stated that zoning ordinances are in derogation of the common law and therefore ambiguous zoning terms must be construed in favor of the free use of private

property. 74 Wis. 2d at 91. The court of appeals in *Hillis* cited this statement to show that balance struck by the courts between government and landowners was served by declining to apply to properly used buildings the village's 50% restriction on expansion of buildings in which nonconforming uses are taking place. *Hillis*, ¶¶15-16.

The *Cohen* analysis woven into *Hillis* is an indication that the *Hillis* opinion does not apply to shoreland zoning provisions, for two reasons that relate to the connection between shoreland zoning and the constitutionally mandated public trust doctrine. First, contrary to the zoning ordinance at issue in *Hillis*, which the court found to be in derogation of the common law, shoreland zoning setbacks continue the common law restrictions on interferences with public rights in navigable waters under the public trust doctrine. Second, the courts have struck a different balance between government and landowners where the public trust is implicated.

Shoreland zoning and shoreland setbacks promote protection of water quality, fish and wildlife habitats, and scenic beauty, so as to preserve the public's interest in the shoreland and navigable waters of the state. See *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, ¶22, 676 N.W.2d 401. Protection of this public interest is mandated by the state constitution in the name of the public trust doctrine, and is carried out through the state shoreland zoning law. *Just v. Marinette County*, 56 Wis. 2d 7, 10, 201 N.W.2d 761 (1972). "Lands adjacent to or near navigable waters exist in a special relationship to the state." *Just*, 56 Wis. 2d at 18.

The public interest extends to the quality of the water resource itself, and development within 75 feet of a navigable waterway is presumptively harmful to that resource. *State v. Winnebago County*, 196 Wis. 2d 836, 847, 540 N.W.2d 6 (Ct. App. 1995); *Just*, 56 Wis. 2d at 10 (The basic purpose of a shoreland zoning ordinance "is to protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands.").

An encroachment in a shoreland setback threatens public rights in the adjacent water. See *Just*, 56 Wis. 2d at 16-17 (noting "the interrelationship of . . . the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty"). Recent research confirms the predominant and cumulative harm to waterways from shoreland development. *Effectiveness of Shoreland Zoning Standards to Meet Statutory Objectives*, WDNR PUBL-WT-505-97 (1997)  
<http://www.dnr.state.wi.us/org/water/wm/dsfm/shore/documents/WT50597.pdf>).

In light of this link between navigable waters and the lands adjacent to them, title to property abutting navigable waters is encumbered by the public trust, which is an unqualified background principle of state property and nuisance law. See *Just*, 56 Wis. 2d at 16-19; *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis. 2d 497, ¶23, 628 N.W.2d 781; *Gillen v. City of Neenah*, 219 Wis. 2d 806, 829-33, 580 N.W.2d 628 (1998). The public trust is part of the "organic laws of our state," originating before statehood. *Diana Shooting Club v. Husting*, 156 Wis. 261, 269, 271, 145 N.W. 816 (1914). The rights of citizens under the public trust doctrine

Richard Wedepohl  
May 17, 2005  
Page 4

are "entitled to all the protection which is given financial rights." *Muench v. Public Service Comm.*, 261 Wis. 492, 511-12, 53 N.W.2d 514, 55 N.W.2d 40 (1952).

The public trust rule of property law is reflected in state nuisance law. The common law nuisance of jeopardizing public rights in state waters has been codified by legislative authorization of the state to abate nuisances to restrict development affecting state waters. *See Gillen*, 219 Wis. 2d at 832-33; *Hixon v. Public Service Comm.*, 32 Wis. 2d 608, 616, 146 N.W.2d 577 (1966).

The body of public trust case law establishes that protection of public rights in navigable waters through restrictions on shoreland development is part of Wisconsin's common law, and that the courts have balanced public and private rights in favor of the public. Accordingly, the opinion in *Hillis*, which concerns municipal zoning's 50% limitations on expansion of nonconforming uses, does not extend to county shoreland zoning's 50% limitations on expansion of nonconforming structures.

In sum, the *Hillis* decision does not apply to county shoreland zoning, and specifically to structures that do not comply with county shoreland zoning setbacks. The law that does apply to the expansion of structures that do not comply with county shoreland zoning setbacks, and that therefore require variances, is set forth in *State ex rel. Ziervogel*, 269 Wis. 2d 549, ¶¶7 and 33, and in *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, ¶¶32 and 34-35, 679 N.W.2d 514.

Sincerely,

JoAnne F. Kloppenburg  
Assistant Attorney General

JFK:drm

c: Toni Herkert  
Marcia Penner  
Edwina Kavanaugh

bcc: William O'Connor  
Lynn Markham, UWSP